JD(ATL)—16—03
Huntsville, AL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

PPG INDUSTRIES, INC.

and **CASE 10–CA–32813**

RANDALL MARTIN, An Individual

John D. Doyle, Jr., Esq.,
for the General Counsel.
Cameron S. Pierce, Esq.,
for the Company.
Randall Martin, Pro Se

SUPPLEMENTAL DECISION

WILLIAM N. CATES, Administrative Law Judge: On December 31, 2001, I issued my Bench Decision in this case finding PPG Industries, Inc., (Company) did not violate Section 8(a)(1), (3) and (4) of the National Labor Relations Act, as amended, (Act) by on June 12, 2000, suspending and on June 16, 2000, discharging its employee Randall Martin (Martin). Although in my Bench Decision I found Counsel for General Counsel (Government Counsel) established a prima facie case by showing Martin engaged in activities on behalf of United Steelworkers of America and Teamsters Local Union 402 (Unions), which activities were well known to the Company and that the Company had, in the past, exhibited animus toward its employees' union activities; I concluded it nonetheless demonstrated it would have discharged Martin even in the absence of any union or charge filing activities on his part. I found the Company's discharge of Martin was in keeping with its guidelines, policies and practices regarding absenteeism and call-in procedures. The Company demonstrated it consistently enforced its applicable attendance policies and did not treat Martin differently than other employees.

On November 20, 2002, the National Labor Relations Board (Board), with Member Cowen dissenting, remanded the case to me (338 NLRB No. 68). In its remand order the Board concluded I failed to resolve certain evidentiary issues. The Board stated:

> In this regard, the Judge failed to act on the [Company's] petition to revoke [Government] Counsel's subpoena for documents concerning the

> administration of the [Company's] attendance policy. Nor did the Judge rule on the [Government] Counsel's request that an adverse inference be drawn from the [Company's] failure to produce two classes of documents in response to the subpoena. Therefore, we will remand this case to the Judge to consider: (1) whether to grant the [Company's] petition to revoke; and (2) if the petition to revoke is denied in whole or in part and the [Company] fails to produce the relevant documents, whether an adverse inference should be drawn.

On December 6, 2002, I issued an Order Inviting Parties to File Briefs prior to my preparation of this supplemental decision. Briefs were filled on January 21, 2003, by counsel for the Government and Company.

On November 23, 2001, at the request of Government Counsel, a five page single space subpoena duces tecum (B-300644) was issued directing the Company's custodian of records to appear at trial and produce various documents detailed in the subpoena.[1] The Board noted in its remand order that its focus was on two classes of documents the Company failed to produce in response to the subpoena. Those two classes of documents, it appears, are covered by paragraphs 5 and 11 of the subpoena. Paragraphs 5 and 11 read as follows:

> 5) Such records of discussion, disciplines, suspensions, warnings, recommendations for issuance of discipline, termination notices, handwritten notes, internal memoranda, and other documents as reflected or indicate the occasions on which non-supervisory employees employed at Respondent's Huntsville, Alabama facility received disciplines, suspensions, warnings, discharges, or other corrective action, for the time period January 1, 1999 through June 1, 2001, for attendance or failure to call in problems or deficiencies, including without limitation, such documents as reflect the identity of the person subject to the corrective action, the identity of the person issuing the corrective action, the identity of any person or persons who recommended such corrective action, and the reasons for the corrective action.
>
> 11) Such applications for leave, pay records, time cards, schedules, handwritten notes, attendance records, printouts of electronic records, computer files, and other documents as indicate, for the time period January 1, 1999 through June 1, 2001, the times non-supervisory employees at the Respondent's Huntsville, Alabama facility, were absent from work during a time when they would ordinarily have been scheduled, including with limitation, such documents as indicate or reflect, for each such absence, the identity of the employee, the date of such absence, tardy, or early out, the time(s) of such absence, tardy, or early out, whether the

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1 The pertinent documents sought by Government Counsel relate to the Company's attendance policy.

> employee was charged under the attendance system, whether such absence, tardy, or early out was paid or unpaid, whether the absence, tardy, or early out was excused, whether the absence, tardy, or early out was approved, the date and time of any request or application to be absent, tardy, or to early out, the date of the approval, the identity of the person or persons who considered such application or request, the decision on the request or application (granting or denying), and the reasons for decision.

The two classes of documents the Company did not produce, for employees other than Martin, are 1) Employee/Discipline History and 2) Absence with Notes.

On December 3, 2001, the Company filed a Petition to Revoke Subpoena Duces Tecum (B-300644). On December 5, 2001, Government Counsel served on the Company its Opposition to the Petition to Revoke Subpoena Duces Tecum (B-300644).

The tenor of the parties' positions are as follows. First, the Government contends it needs the two classes of documents in question to test the Company's contention it did not treat Martin differently than other employees when it suspended and thereafter discharged him for attendance and reporting off infractions. Second, the Company contends it did not, and needs not, provide the two classes of documents in question because it has already provided the Government with documents containing hundreds of pages which set forth each employees' history of unexcused absences and whether the employees received discipline for those absences. The Company also contends it provided the Government with relevant disciplinary records for employees disciplined for the same infractions as Martin. The Company contends further document production would be unnecessary, unreasonably cumulative, duplicative, and unduly burdensome.

A brief overview of certain facts and findings from my Bench Decision is helpful. I concluded the Government established an initial showing that Martin's suspension and discharge was discriminatorily motivated; however, I also concluded the Company demonstrated it would have suspended and terminated Martin even in the absence of any protected conduct on his part. As noted in my Bench Decision Martin was given a Record of Discussion on December 8, 1999, reviewing with him what was expected of him regarding regular attendance. The Record of Discussion which Martin signed reads in part:

> This is to review with you the expectation of regularly attendance. As of 12/6/99, you are at 4.0 Occurrences in Absence Program. Absenteeism above four Occurrences will trigger a Disciplinary action.
>
> Therefore, you will need to remain at four Occurrences until twelve months. This is to advise you to monitor your absences and maintain regular attendance, as required of Works 22 Employees

I found no showing that any of the absences that brought about the December 8, 1999, Record of Discussion and the warning of the impact future absences would have on

his employment were unlawfully motivated. It is undisputed that Martin did not work on June 9, 2000, nor did he call–off, as required, prior to the start of his work shift on that date. I found Martin's absence on June 9, 2000, violated two of the Company's disciplinary policies. Martin's failure to report-off on June 9, 2000, advanced him one step in the disciplinary procedure. Martin's absence on June 9, 2000, was, as just noted, at a time when he had previously been alerted to monitor his attendance, and his unexcused absence on that date advanced him one step in the progressive discipline system elevating him to that step which resulted in his termination. Martin had at the time of his unexcused absence on June 9, 2000, already acquired 4 unexcused absences in a 12-month period. The Company did and I concluded would have discharged Martin even in the absence of any protected conduct on his part for violating its attendance and reporting off policies. I found the Company consistently enforced its attendance and reporting policies and did not treat Martin differently than other employees.

Section 102.31(b) of the Board's Rules and Regulations provides that the trial judge shall revoke a subpoena if in his opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, **or if for any other reason sufficient in law the subpoena is otherwise invalid**. Section 102.31(b) further directs that the **trial judge make a simple statement of procedural or other grounds for the ruling on the petition to revoke** (emphasis added).

To the extent not previously satisfied I grant the Company's Petition to Revoke Subpoena Duces Tecum B-300644 in all respects.[2] I am fully persuaded the Company has provided Government Counsel with sufficient documents from which he is able "to adduce comparable incidents of absenteeism that either were or were not the subject of discipline." Stated differently the Company provided Government Counsel, at trial, with appropriate and sufficient documents relevant to the disparate treatment issue such that and any further production would be unnecessarily cumulative.

As noted elsewhere the Company did not provide Employee Action/Discipline History records. The Employee Action/Discipline History records cover an employee's entire history of discipline (and it appears commendations as well). The Employee Action/Discipline History records reflect the date, action/level, reason, department of employee, supervisor of employee, comment and clear date (where appropriate) for any employee offenses. The records may, where appropriate, include discipline for violations of infractions that do not relate to absenteeism or failing to report off which were the offenses for which the Company discharged Martin. The Company provided Government Counsel with disciplinary records for employees who had been disciplined for absenteeism as well as for failing to report off, which were, as just noted, the infractions for which the Company discharged Martin. In agreement with the Company I

2 To the extent the Board's Remand Order could be read to require consideration of a failure by the Company to produce documents beyond the two classes of documents referred to in the remand this revocation is intended to cover such.

am fully persuaded Government Counsel has not demonstrated that the Employee Action/Discipline History records contain any relevant information, regarding absenteeism and failing to report off, that is not already contained in the disciplinary records provided by the Company to Government Counsel at trial.[3]

In that regard the Company provided Government Counsel with documents including several hundred pages of Employee Absenteeism Report forms for all production and maintenance employees at the facility for an applicable 21-month period. The Employee Absenteeism Report forms provided Government Counsel with the complete attendance history of non-supervisory employees at the facility and whether employees were disciplined for any absence related offences. These Company provided records demonstrate whether an employee automatically received step discipline when the employee attained the specified number of unexcused absences during the specified time period. Government Counsel had the necessary records to probe whether the Company applied its absenteeism policy in a disparate manner.[4] Any further production of documents by the Company would simply have been and would continue to be unnecessarily cumulative.

The second class of documents at focus herein that the Company did not provide are the Absence with Notes forms. The Absence with Notes forms are unofficial software created records maintained in electronic form by Company Human Resources Supervisor Joyce Spiller. All information entered on the Absence with Notes software records is at the discretion of Spiller. Spiller may enter comments on her Absence with Notes electronic forms that she may have received in reference to any specific absence to assist her in keeping tract of occurrences; however, the records do not address mitigating circumstances. I am fully persuaded these incomplete discretionary electronic Absence with Notes forms would not have provided any additional information not already provided to Government Counsel in greater detail in the records supplied at trial by the Company to Government Counsel. Nothing in the Absence with Notes would assist Government Counsel to adduce comparable incidents of absenteeism beyond what the documents already produced showed. Requiring the production of the Absence with Notes forms would constitute an unnecessary production of cumulative and duplicative documents and as such would be unduly burdensome to the Company.

In summary, and for the reasons set forth above, I grant the Company's Petition to Revoke Subpoena Duces Tecum B-300644, issued at the request of Government Counsel, to the extent the Company has not already satisfied the production requirements outlined therein.

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3 The time frame for disciplinary records provided by the Company was limited by the Company to an appropriate time frame. Any greater time frame would have been unnecessary and burdensome.

4 The fact such necessary records were provided by the Company to Government Counsel may explain Government Counsel's failure to raise on the record any subpoena concerns before he rested, without reservation, his case-in-chief.

In light of the above ruling, I need not, and do not, address the conditional second part of the Board's remand order pertaining to the drawing of an adverse inference.

I reaffirm my prior Bench Decision.

Dated at Washington DC

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William N. Cates
Associate Chief Judge